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Nos. 778 and 779

Supreme Court of the United States

October Term, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, et al.,
Appellants

v.

UNITED STATES OF AMERICA, et al.,
Appellees

NORFOLK AND WESTERN RAILWAY COMPANY
Appellant

v.

UNITED STATES OF AMERICA, et al.,
Appellees

On Appeals from the United States District Court for the Southern District of New York

MOTION TO ADVANCE

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Come now appellants Baltimore and Ohio Railroad Company, et al., referred to generally as the "unprotected railroads," and pray that this Court enter an order setting an expedited procedure for the determination of the appeals in this extraordinary case.

In support of this motion appellants respectfully show as follows:

1. These are appeals from a final judgment of a three-judge court which (1) dismissed complaints seeking injunctive relief with respect to an order of the Interstate Commerce Commission permitting immediate consum-

mation of a merger of the Pennsylvania Railroad and the New York Central Railroad and (2) dismissed Norfolk and Western's complaint seeking to set aside a Commission order directing N&W to include Erie-Lackawanna, Delaware and Hudson, and Boston and Maine in its system on prescribed terms. The background facts and the nature of the very substantial questions presented by these appeals are set forth in the Jurisdictional Statements which are incorporated by reference herein to avoid repetition.

2. When the Penn-Central merger case was before this Court last year, the importance of the issues was stressed (*Baltimore & Ohio R. Co* v. *United States*, 386 U.S. 372, 392 (1967)):

> "After all, it [the Penn-Central merger] is the largest railroad merger in our history and if not handled properly could seriously disrupt and irreparably injure the entire railroad system in the northeast section of the country—to the great detriment not only of the parties here but to the public convenience and necessity of the entire nation."

3. As this Court thus recognized, assuming the consummation of the Penn-Central merger the basic issue affecting the public interest is how the remaining eastern railroads can be restructured to preserve their service in the face of the powerful Penn-Central system. The Court directed that this question be answered, stating that "the Commission erred in approving the immediate consummation of the merger without determining the ultimate fate of the protected roads" (386 U.S. at 378). But this critical determination has still not been made.

4. Apart from the violation of this Court's mandate resulting from the Commission's failure to determine the "ultimate fate" of the three protected roads, additional serious legal errors creating grave injury to the public and the parties are raised by these appeals. As is shown in the Jurisdictional Statements, the Commission proceeded on a patently incorrect assumption of fact—that it had assured the inclusion of the protected lines in the existing Norfolk and Western system. This assumption was rejected by the court below which nevertheless upheld the Commission's order by supplying its own finding in the absence of any findings by the agency addressed to the realities of the situation. Because the consummation of Penn-Central is to be permitted before the inclusion of the protected lines in a major system has been settled, irreparable injury to the unprotected eastern railroads is threatened, injury which the Commission has never found to be consistent with the public interest.

5. In order to preserve the jurisdiction of this Court pending appeal, appellants have filed an application for stay before the Circuit Justice for the Second Circuit. The immediate threat of consummation of the Penn-Central merger, and the necessity for determination of the issues by this Court prior to consummation of that merger, urgently call for the establishment of a procedure that would preserve this Court's jurisdiction to decide the critical legal issues presented in respect to this unprecedented merger.

6. This Court has already indicated that expedited procedures are appropriate for both the *Inclusion* and

the *Merger* cases. Indeed, referring specifically to the *Inclusion* proceeding, the Court stated that expeditious handling is the means best calculated to assure that the public interest is protected and that the Penn-Central merger is not consummated without due regard for the serious harm it is capable of inflicting (386 U.S. at 392):

> "If its [the Commission's] order is attacked in court the hearing there can be expedited, as was this one, and an early determination made. We do not believe that this is too high a price to pay to make as certain as human ingenuity can devise, a just and reasonable disposition of this matter for all of the parties."

7. Moreover, it was recognized by the court below that, absent the New Haven problem, a stay was justified and that expedited treatment of this appeal would eliminate any possible adverse effects which a stay might otherwise have for the interests of the New Haven (J.S., App. B, p. 70). Although these appellants disagree with the view of the court below that the New Haven problem is a sufficient reason for permitting the immediate consummation of Penn-Central even before this Court has the opportunity to examine the substantial issues presented by these appeals, appellants seek an expedited hearing schedule which will avoid the dangers the court below feared.

8. This Court having already stated that both the *Merger* and the *Inclusion* cases should be handled expeditiously (386 U.S. at 390-92), this motion requests that both appeals be handled on the same expedited

schedule. The court below decided both cases at the same time, in a single opinion, and indeed relied upon its affirmance of the *Inclusion* order to justify its failure to grant the relief requested by these appellants in the Penn-Central action. Under this Court's mandate of March 27, 1967, the "decision as to the future of the protected railroads and their inclusion in a major system [must] be decided prior to consummation of the Penn-Central merger" (386 U.S. at 390). Inasmuch as substantial legal issues exist as to the validity of the Commission's order directing N&W to include the protected lines in its system, both appeals should be heard on the same expedited basis.[1]

WHEREFORE, appellants pray that an order be entered setting dates for the filing of briefs by appellants, and by appellees, and setting the case for oral argument on the jurisdictional papers and on the merits. In order that these appeals may be heard and decided as expeditiously as possible, appellants stand ready to argue

[1] When the *Merger* case was previously before this Court an expedited schedule was adopted. Erie-Lackawanna R. Co. v. United States, 385 U.S. 914 (1966). Similar procedures were followed in Hannah v. Larche, 361 U.S. 910 (1959) and Stack v. Boyle, 342 U.S. 1, 4 (1951).

their appeals on the basis of the jurisdictional papers in this Court and the briefs filed with the court below and included in the certified record filed with this Court.

Respectfully submitted,

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO CONSOLIDATE, REPLY TO APPLICATION FOR STAY, STATEMENT AS TO ADDITIONAL QUESTION PRESENTED BY APPEALS, AND REPLY TO MOTION TO ADVANCE OF THE DELAWARE AND HUDSON RAILROAD CORPORATION

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November 6, 1967

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MOTION TO CONSOLIDATE, REPLY TO APPLICATION FOR STAY, STATEMENT AS TO ADDITIONAL QUESTION PRESENTED BY APPEALS, AND REPLY TO MOTION TO ADVANCE OF THE DELAWARE AND HUDSON RAILROAD CORPORATION

Appellants have filed a Jurisdictional Statement in each of these appeals together with a motion to advance both

appeals and, in the first entitled of the appeals, an application for stay of consummation of the Penn-Central merger.*

D&H moves to consolidate these appeals on the grounds set out in Part I hereof. The remainder of this document constitutes D&H's response to appellants' papers with the exception that, as noted in Part IV hereof, D&H proposes that if an expedited scheduling of these appeals is granted pursuant to appellants' motion to advance, D&H be granted leave to file a brief in reply to points made in the Jurisdictional Statements.

I. *Motion to Consolidate*

Appellants have filed two separate appeals from the single judgment of the District Court involving the Penn-Central *Merger* case (Appeal No. 778) and the N&W *Inclusion* case (Appeal No. 779). They have, however, in their motion to advance, proposed that "both appeals should be heard on the same expedited basis."

Concurring in their proposal as to hearing the cases on the same expedited basis, D&H hereby moves that the two appeals be consolidated. As both the single decision of the Court below and the papers filed by appellants make clear, the two matters are so interrelated as to require not merely that they be heard on the same expedited basis but that they be disposed of together, as in the lower Court.

As the Jurisdictional Statement in No. 779 says (p. 9), the N&W *Inclusion* case "was regarded by both the Commission and the district court as the key needed to unlock the benefits of the Penn-Central merger without destroying

* Abbreviations herein used are those employed in appellants' papers.

three railroads now providing essential transportation service to the public." Certainly the Supreme Court regarded the two proceedings as necessarily intertwined when in *Baltimore & O. R.R. Co.* v. *United States,* 386 U.S. 372 (1967), it required deferral of the Penn-Central merger pending conclusion of the pending inclusion proceedings. The fundamental interrelationship of the two appeals is further apparent from Parts II and III hereof.

As the Commission itself stated below in the Penn-Central case (August 28, 1967 brief, pp. 10-11), consummation of the Penn-Central merger should be dependent upon the absence of "basic infirmity" in the Commission's order in the N&W *Inclusion* case. While we disagree wholeheartedly with virtually everything said in N&W's Jurisdictional Statement in the *Inclusion* case, it cannot be denied that N&W has advanced contentions which if upheld would certainly establish "basic infirmity" in the Commission's order therein.

For these reasons D&H urges that the two appeals be consolidated.

II. *Reply to Application for Stay*

Grant of the motion for consolidation and of the motion to advance, hereinafter discussed, would seem to make it unnecessary to deal with the appellants' application for stay in the *Merger* case.* However, if this should not be the case, D&H wishes now to record the fact that it is compelled, in view of the appeals that have been taken by N&W and its allies, to support their application for stay on two grounds:

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* By reason of the filing of the application for stay and notice of appeal, a stay in the *Merger* case is now in effect under the judgment of the District Court (Jurisdictional Statement, B-71).

1. Appellants in No. 778 are urging in their Jurisdictional Statement that the revised provisions of Appendix G established in the Commission's Report of June 9, 1967 in the Penn-Central *Merger* case, 330 I.C.C. 328, 362-69, are unlawful. These provisions are designed to provide interim protection for D&H, as well as EL and B&M, prior to their inclusion in a major system, and this Court on March 27 of this year held that the authorization of immediate consummation of the Penn-Central merger without such protection was patently invalid. *Baltimore & O. R.R. Co.* v. *United States, supra* at 388-90.

In view of the appeal in No. 778, it is obvious that it cannot yet be said that D&H, EL and B&M will have lawful interim protection if Penn-Central is consummated now. The District Court held (Jurisdictional Statement, A-16) that injunctive relief deferring consummation of the Penn-Central merger "would doubtless be required" if the revised Appendix G were determined to be unlawful. Certainly a stay of the merger pending determination of such lawfulness is likewise required.

2. Furthermore, even if the lawfulness of the Appendix G conditions for interim protection were not in issue, a stay of the Penn-Central merger pending determination of N&W's appeal in the N&W *Inclusion* case, No. 779, would also be necessary in view of this Court's decision in *Baltimore & O. R.R. Co.* v. *United States, supra.* The Court held, 386 U.S. at 390, that "it is necessary that the decision as to the future of the protected roads and their inclusion in a major system be decided prior to consummation of the Penn-Central merger". The Court also phrased its holding this way: "We believe that the Commission erred in approving the immediate consummation of the merger

without determining the ultimate fate of the protected roads" (*id.* at 378). So long as N&W's appeal in the *Inclusion* case is pending, D&H's future and its inclusion in a major system have not been decided.

Although concluding (Jurisdictional Statement, B-68) that the Appendix G protection would "take sufficient care of them [the protected roads] while they work out their future," * the Court below has indicated (*id.* at B-70) that in view of the Supreme Court's decision, the District Court would itself have stayed consummation of the Penn-Central merger pending appeal as to either the *Merger* case or the *Inclusion* case if it were not for the critical need of NH for cash support to continue to perform its operations. However, as set out in appellants' application for stay (pp. 6-8), there is no assurance at this time that if Penn-Central were now consummated continuance of NH's service would thereby be preserved. Unless and until such assurance exists there appears to be no basis for the lower Court's denial of stay of the merger pending this Court's disposition of N&W's appeal in the *Inclusion* case.

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* In this connection the District Court observed (Jurisdictional Statement, B-10) that D&H made no objections to the Appendix G conditions. While D&H did not challenge the specifics of those conditions because it believed them to involve a matter on which the courts would defer to administrative expertise, D&H contended in the Court below that the Appendix G plan of interim protection contains inherent limitations which make it less effective protection for D&H from the traffic consequences of a Penn-Central system than inclusion of D&H in a major system (Brief of September 5, 1967, in the *Merger* case, pp. 18-20). The Commission has itself noted some of the reasons why the traffic restrictions of Appendix G would be of limited value (330 I.C.C. at 344). The revenue indemnity formula likewise contains no complete assurance of protection because the formula is such that considerations having nothing to do with diversion of traffic to Penn-Central affect the amount of indemnity payable (*id.* at 351), and thus might eliminate all indemnity even though D&H were to sustain substantial diversion of its traffic to Penn-Central.

III. *Statement as to Additional Question Presented by Appeals*

Pursuant to Rule 10 of the Rules of the Supreme Court, D&H makes the following response in respect of appellants' Jurisdictional Statements:

In view of N&W's appeal in the *Inclusion* case, No. 779, and solely because of such appeal, D&H supports the appeal of N&W and its allies from the decision in the *Merger* case, No. 778, to the extent of their position that under the decision of this Court in *Baltimore & O. R.R. Co. v. United States, supra,* the Penn-Central merger must be delayed until there is a final decision assuring D&H of inclusion in N&W (or failing that, some other major system).

In addition thereto, D&H asserts that a further question is presented in the Penn-Central *Merger* case, again solely because of N&W's appeal in the *Inclusion* case. That question is: Did the District Court err in failing to hold that the Commission should have reserved jurisdiction to provide for capital loss indemnity by a Penn-Central system running to D&H (and/or of any other road on whose inclusion in the N&W system D&H inclusion in that system is made dependent*) in the event of a downward revision (on account of the traffic consequences of a Penn-Central system) of the terms for inclusion of D&H and/or such other road in the N&W system which may be required as a result of judicial review of the N&W *Inclusion* case?

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* Under the terms of the Commission's decision in the *Inclusion* case, D&H inclusion in N&W is made dependent upon the inclusion of EL in N&W (331 I.C.C. 22, 43 (1967)).

This question is a substantial one. The possible need for capital loss indemnity is founded on the desirability in the public interest of maintaining rail competition to the extent feasible after consummation of a Penn-Central system. There would be no substantial rail system competition by United States roads in the area east of Buffalo, N.Y., unless EL, D&H and B&M are included in a system other than Penn-Central, and, as the Commission found in its first Report in the Penn-Central *Merger* case (327 I.C.C. 475, 532 (1966)), it is doubtful that without inclusion in a major system, D&H, EL and B&M could survive the competition of a Penn-Central system. N&W's present lines do not run east of Buffalo or north of Hagerstown, Md., and therefore the inclusion in the N&W system of the three roads, with their lines from Buffalo to New York City, Northern New York, Montreal and New England, is a logical step to provide routes in the Northeast competitive with those which Penn-Central would have (330 I.C.C. 780, 792 (1967)). The Commission has stated in the N&W *Inclusion* case (*id.* at 796) that because of the effects on competition, it is "firmly convinced" that inclusion of D&H, EL and B&M in N&W is preferable to their inclusion in Penn-Central.

However, N&W has urged that the traffic losses of the protected roads to Penn-Central would not be offset by traffic gains resulting from their inclusion in the N&W system and that N&W should not be required to include those roads except on terms reflecting a substantial downward adjustment in the price it would otherwise pay (see, e.g., Jurisdictional Statement, No. 779, p. 12, n. 6; N&W's brief of September 5, 1967 in the *Inclusion* case, pp. 18-31). The position of D&H—and of EL and B&M—has been

that no such adjustment is justified but that if such an adjustment were ultimately held to be required, they should be indemnified by Penn-Central on account thereof, because otherwise it would be impossible to include those roads in a competitive system—N&W—on fair terms.

The District Court's opinion has recognized (Jurisdictional Statements, B-16-17, 69) the significance of this issue if the Supreme Court does not affirm its decision in the N&W *Inclusion* case. The District Court has there pointed out that if the *Inclusion* case is reversed, this Court might in the *Merger* case direct the Commission to consider the matter of capital loss indemnity in further proceedings in the *Merger* case. This follows a suggestion made by the Commission on brief below (August 28, 1967 in the *Merger* case, p. 14). D&H urges that this Court so direct the Commission in the event the *Inclusion* case is remanded.

IV. *Reply to Motion to Advance*

D&H agrees with the appellants that the appeals should be expedited in the public interest. To this end D&H supports appellants' suggestion that the appeals be argued on the basis of the jurisdictional papers in this Court and the briefs filed below, with one obviously necessary amendment: that each appellee be entitled to file a brief in reply to the Jurisdictional Statements. We suggest this brief be due on the day prior to the oral argument before this Court. This procedure would eliminate the right of D&H and other appellees to file motions to affirm without argument. However, in view of the situation described by the Court below (Jurisdictional Statements, B-70), and referred to in appellants' motion to advance and, of course,

considering the fact that it cannot be certain that such motions would be granted, D&H is willing to dispense with this right in the interest of expedition.

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